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In The

Supreme Court of the United States

People of the State of New York and the Public Service Commission of the State of New York, et al.
Petitioners,

v.

Federal Energy Regulatory Commission, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Inasmuch as the states in 1935 regulated all aspects of the delivery of electricity to retail customers (including retail transmissions) and Congress, when it enacted the 1935 Federal Power Act (FPA), stated unequivocally that it was not disturbing state regulation, can the 1935 Federal Power Act be read as endorsing FERC preemption of state regulation of the rates, terms and conditions of retail transmissions?

PARTIES

Petitioners joining in this brief are the Public Service Commissions of New York, Florida and Wyoming, the Public Utilities Commissions of Idaho and North Carolina, the New Jersey Board of Public Utilities, the Vermont Board of Public Utilities, the Virginia State Corporation Commission, the Washington Utilities and Transportation Commission, and the National Association of Regulatory Utility Commissioners (NARUC). Pursuant to Rule 29.6, none of the Petitioners/Intervenors State Utility Commissions, which are governmental agencies, needs to file a corporate disclosure statement.

NARUC is a quasi-governmental non-profit corporation organized under the laws of the District of Columbia. It has no corporate parents or affiliates and has not issued shares of stock or debt securities to the public. Within its membership are the governmental bodies of the 50 states engaged in the economic and safety regulation of carriers and utilities. A full list of parties is provided in the Appendix for State Petitioners (States App.) R.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (States App. C) is Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n, 225 F.3d 667 (D.C. Cir. 2000). The court's order on rehearing (States App. A) is not officially reported. FERC Order 888 appears at FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540. FERC's rehearing decisions (Orders 888-A and 888-B) are reported, respectively, at FERC Stats. & Regs. ¶ 31,048 and 81 FERC ¶ 61,248 (1997). Pertinent portions of FERC orders are supplied in States App. D through F.

This Court granted Certiorari on February 26, 2001.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered June 30, 2000. The order denying rehearing was issued August 22, 2000 and the petitioner States sought review within 60 days. The grant of Certiorari was issued February 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 824(a)-(e)
(FPA § 201(a)-(e)) provides:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local

distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter,

means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

Other relevant statutory provisions, 16 U.S.C. § 824d (FPA 205), 16 U.S.C. § 824e (FPA 206) and 16 U.S.C. § 824j(h) (FPA 212(h)), are provided in States App. G.

STATEMENT OF THE CASE

A. Traditional State Regulation Of Retail Electric Service

State regulatory commissions are statutorily obligated to assure that customers pay "just and reasonable" rates for electric service. E.g., Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm'n of the State of N.Y., 69 N.Y.2d 365, 369, 507 N.E.2d 287, 289 (1987). Although there are many acceptable methods for setting utility rates (e.g., cost of service; debt service; comparisons to surrounding utilities), commissions often design them to recover reasonable and prudent costs that a utility incurs over a period of time. This methodology entails examination of: (1) revenues the company has earned, or is expected to earn,

at current rates; (2) operating expenditures and depreciation on capital investment; (3) the rate base, or capitalization, upon which the company is allowed to earn a return; and (4) the rate of return needed to cover the company's cost of raising capital.

In paying their electric bills, therefore, retail customers normally reimburse the utility for its costs of:

1. Generating, or purchasing, the electricity (commodity) that the customer consumes during the billing period.

2. Delivering electricity to the customer over transmission (generally high voltage) and distribution (usually lower voltage) lines.

3. Metering the customer's usage.

4. Billing the customer and resolving customer inquiries or complaints.[1]

Most electricity used in the United States is generated in the state where it is used. See, e.g., New York State Independent System Operator, January 2001 Report, Attachment 4-C; Florida Reliability Coordinating Council,

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[1] The terms commodity, transmission and distribution (or delivery), metering and billing refer to specific elements of retail service. In an unbundled environment (discussed below), each term can be considered a separate service with the commodity, metering and billing (as opposed to delivery) being potentially competitive services.

"2000 Regional Load and Resource Planning" (July 2000) at 33 (www.frcc.com/default.htm); Idaho State Electricity Profile (1998), U.S. Dept. of Energy, Energy Information Admin., www.eia.doe.gov. Tables 1 & 9.

If electricity is consumed by the buyer, the transaction is deemed retail; when the electricity is resold by the buyer, the initial transaction is wholesale.[2] The majority of electric sales in the United States are made by vertically integrated generation, transmission and distribution utilities directly to their retail customers without passing through a wholesaler. Most such utilities, however, do purchase some power on a wholesale market for resale to their retail ratepayers. State regulators generally allow utilities to recover their prudently incurred wholesale commodity costs in retail rates.

B. The 1935 Federal Power Act

The Federal Power Commission (FPC)[3] was created in 1920 (First Annual Report of the Federal Power Commission (FPC First Annual Report) (1921)). It primarily regulated the licensing of hydroelectric facilities. Id. at 5-6. The FERC did not regulate electric rates, which were overseen by the states. Id. at 57; Hearings Before the Committee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., on S. 1725 (1935) (1935 Hearings on S. 1725) at 239, 253.

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[2] "Wholesale sales," "retail transmission service," "distribution facilities" and other relevant terms are defined in the Glossary of Terms contained in States App. Q.

[3] The Federal Power Commission (FPC) was renamed the Federal Energy Regulatory Commission (FERC) in 1977. The FPC/FERC will be referred to as FERC throughout this brief.

State regulation of wholesale energy transactions between buyers and sellers in different states ended in 1927, when the Court in Public Utilities Comm'n of Rhode Island v. Attleboro Steam and Elec. Co., 273 U.S. 83, 89 (1927), held that, irrespective of whether the Federal Government regulated wholesale sales between states, the states were barred from doing so by the Commerce Clause. FERC's 1928 Report to Congress recommended legislation to fill the gap (Eighth Annual Report of the Federal Power Commission (1928) at 13), but no bill was introduced until 1932.[4] At that point, Congress reorganized FERC, but did not empower it to regulate wholesale services of public utilities (46 Stat. 797 (1931)).

FERC thereafter conferred with representatives of state commissions (Baldridge, supra at 256) and in 1935 proposed legislation to fill the jurisdictional gap that resulted from Attleboro. After modifying FERC's proposal to safeguard pre-existing state regulation (see 79 Cong. Rec. 8374 (1935) (statement of Senator Hastings)), Congress enacted the Federal Power Act (FPA) authorizing FERC to regulate wholesale sales and associated transmission in interstate commerce (§ 201(b)). The FPA, as amended, stated that "federal regulation is to extend only to those matters which are not subject to regulation by the States" (emphasis added; § 201(a)).

C. FERC's Decision Under Review

In 1998, FERC decided that the FPA's 1935 amendments empowered it to preempt state regulation

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[4] H. Baldridge, The Effect Upon State Powers of Expanded Federal Control in the Public Utility Field, 1 Missouri L. Rev. 245, 256 (1936).

(including rate regulation) of all interconnected transmissions of electricity (those outside Hawaii, Texas and Alaska). Asserting that (1) Congress had only safeguarded the states' regulation of the retail commodity (electricity itself) and its delivery over distribution lines; (2) when states unbundled the commodity element from a consumer's retail rate, "transmission" became a separate service subject to unqualified FERC jurisdiction over electricity being transmitted in interstate commerce; and (3) all transmissions on the interconnected grid are in interstate commerce, FERC claimed preemptive jurisdiction over the portion of unbundled retail deliveries that it termed transmissions. Joint Appendix ("J.A.") 347-350, States App. D-42-44 (FERC Order 888 at 31,780-81); J.A. 593-94, States App. E-39-40 (FERC Order 888-A at 30,339-40).

D. Unbundling And Current State/Federal Regulation

Unbundling is a change in bill format. AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 394 (1999). A retail electricity bill is unbundled when it separately identifies one or more retail elements (e.g., the commodity). For example, a customer might pay 12 cents per kilowatt-hour (kWh) in a fully bundled bill. If the bill is partially unbundled, the customer might pay 4 cents/kWh for the electricity itself (the commodity), and 8 cents/kWh for delivery, metering and billing.

If a state commission wants to encourage the offering of competitive alternatives to metering or billing, it might unbundle those components of the 12 cent/kWh bundled rate. Thus, the customer might see a bill that charges 4 cents/kWh for the commodity, 1 cent/kWh for metering, 1 cent/kWh for billing and 6 cents/kWh for delivery (transmission and distribution).

Unbundling alone, therefore, does not necessarily alter the total due on a customer's bill, either on a per kilowatt-hour or a monthly usage basis. It is an accounting mechanism that allows customers the option of obtaining one or more retail service elements from competitive providers, instead of the utility.[5]

Prior to FERC's adoption of the order under review, the states set rates to recover utilities' costs for all elements of retail service (e.g., the commodity, delivery, metering and billing). Today, the states that have separately identified the commodity, but continue to bundle transmission, distribution, metering and billing, must incorporate FERC's transmission rate into the non-commodity (bundled metering, billing and delivery) portion of the retail bill.

E. The D.C. Circuit's Decision

On June 30, 2000, a Panel of the D.C. Circuit upheld FERC's preemption of retail transmission.[6] The Panel read Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972) and Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61, 73 (1943), as holding that FERC had jurisdiction over all unbundled transmissions of electric energy on interconnected grids (225 F.3d at 693-694 (States App. C-30-32)). In the alternative, it determined that FERC's interpretation of its jurisdictional limitations was entitled to deference (225 F.3d at 694-695; States App. C-33-34).

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[5] Of the 50 states, 25 are in some stage of unbundling retail electric service. See U. S. Dept. of Energy, Energy Information Admin., www.eia.doe.gov.

[6] The relevant portion of the Panel's decision was written by Judge Sentelle (225 F.3d at 679; States App. C-4).

SUMMARY OF ARGUMENT

In attempting to preempt the states' traditional regulation of transmissions of electricity to end-users, FERC has constructed the following syllogism:

> Premise 1 - Congress did not safeguard state regulation of the transmission portion of retail deliveries.
>
> Premise 2 - If the price of the commodity appears separately on an electric bill, then the "jurisdictional lines change," giving FERC jurisdiction of unbundled retail transmissions in interstate commerce (J.A. 349-350, States App. D-44, FERC Order 888 at 31,781).
>
> Premise 3 - All retail transmissions on the interconnected grid are in interstate commerce (J.A. 348, States App. D-43, FERC Order 888 at 31,781).

Conclusion - Therefore, FERC may preempt state regulation of the rates, terms and conditions of all unbundled transmissions of electricity to retail customers on the interconnected grid (J.A. 349-350, States App. D-44, FERC Order 888 at 31,781).

The threshold question is, what standard of review should be applied to FERC's preemption theory. Should FERC's three premises be accepted if they are not irrational, as the Circuit Court reasoned (225 F.3d at 694; States App. C-33-34), or should they be put to a higher test?

When a federal agency attempts to preempt activities traditionally regulated by the states, the Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress'." Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 715 (1985) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996). FERC, therefore, must show that the 1935 Congress intended: (1) not to safeguard state regulation of retail deliveries (Premise 1); (2) to permit FERC to preempt the transmission part of retail deliveries if the retail bill format were to allow consumers to purchase electric energy from competing suppliers (Premise 2); and (3) that all unbundled transmissions on the interconnected grid are in interstate commerce (Premise 3). As discussed below, if any FERC premise fails, its conclusion fails.

There is no provision in the FPA, or its legislative history, that supports FERC's premise that Congress failed to safeguard state regulation over all aspects of retail service. Section 201(a) denied FERC jurisdiction over "matters . . . subject to regulation by the States" and this Court has held that § 201(a)'s safeguard applies to transmission service. Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61, 74 (1943). FERC stressed to Congress, in proposing the FPA provisions under review, that the states were regulating all aspects of service to retail customers, including transmission and distribution (Hearings Before the Committee on Interstate and Foreign Commerce, House of Rep., 74th Cong., 1st Sess., on H.R. 5423 (1935 Hearings on H.R. 5423) at 556; 1935 Hearings on H.R. 5423, Testimony of FERC Solicitor Dozier DeVane at 495) and that no provision of the FPA undermined that regulation (1935 Hearings on H.R. 5423, Testimony of FERC Commissioner

Clyde Seavey (speaking for the whole Commission, 401) at 402 ["Everything is left to the State Commissions that they are performing now."]. It has also acknowledged to this Court that it "has no authority" to regulate the rates for energy transmitted across state lines "to ultimate consumers" (FERC December 1944 Brief to Supreme Court in Connecticut Light & Power Co. v. Federal Power Comm'n, p. 28). Finally, this Court has held that the FPA draws a bright retail/wholesale jurisdictional line that leaves retail matters to the states. Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205 (1964) (Point II.B.1.).

FERC's second premise also fails. Inasmuch as Congress, by FERC's own admission, did not envision unbundling (J.A. 593-594, States App. E-40, FERC Order 888-A at 30,339-40), it could not have intended the retail/wholesale bright line to change with unbundling (J.A. 347-348, States App. D-42, FERC Order 888 at 31,780; J.A. 400-01, D-100, FERC Order 888 at 31,971-72; J.A. 593-594, E-40, FERC Order 888-A at 30,339-40). Further, inasmuch as FERC has preempted states that unbundle the commodity, but not distribution, FERC's assumption that unbundling isolates transmission from state regulated services is inaccurate. Finally, even if unbundling of the commodity creates a separate transmission service, FERC's second premise still fails because the FPA does not authorize FERC to regulate retail transmission service (Point II.B.2.).[7]

The third premise of FERC's syllogism (a claim that all transmissions are interstate) runs afoul of, among other

[7] Sections 206(b), 205, 201(b), 201(c) and 212(h), when read together and in concert with their legislative history, soundly rebuff FERC's claim that Congress empowered it to regulate retail transmission service.

things, FPA § 201(c). FERC's reliance on dicta from Jersey Central and Florida Power & Light for its third premise is misplaced. As shown below, neither case even remotely supports FERC preemption of retail transmissions (Point II.B.3.).

Finally, FERC's position is not only ultra vires, but an impediment to sound energy policy (Point III).

ARGUMENT

FERC EXCEEDED ITS AUTHORITY WHEN IT ATTEMPTED TO PREEMPT STATE REGULATION OF RETAIL TRANSMISSIONS

The following discussion addresses: the erroneous standard of review followed by the Circuit Court (Point I); the FPA's legislative history (Point II.A.) and its language (Point II.B.); and ramifications of FERC preemption (Point III).

POINT I

THE CIRCUIT COURT APPLIED AN ERRONEOUS STANDARD OF REVIEW

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 369 (1986). When a federal agency seeks to override a system of dual (state/federal) regulation, courts require evidence of congressional intent to allow preemption of the cooperative plan. Louisiana Public Serv. Comm'n v. Federal

Communications Comm'n, 476 U.S. at 374-75 ["To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."]; California v. Federal Energy Regulatory Comm'n, 495 U.S. 490, 497 (1990) ["Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme."]. Likewise, if states were regulating an area before Congress enacted a statute upon which a federal agency relies for preemptive power, then the burden of demonstrating congressional intent to authorize federal agency preemption rests with the federal agency seeking to override the traditional state regulation. Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 713 (1985) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n, 461 U.S. 375, 377 (1983) [preemption requires a showing of "clear and manifest" congressional purpose]; DeBuono v. NYSA-ILA Medical and Clinical Serv., 520 U.S. 810 (1997); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995); BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1993); Cipollone v. Liggett Group Inc., 505 U.S. 504, 518 (1992); United States v. Bass, 404 U.S. 336, 349 (1971) [when a statute is alleged to preempt pre-existing state regulation, the statute must evidence a clear congressional purpose to authorize such preemption].

The "clear and manifest purpose," or anti-inference, standard of review essentially refutes claims that Congress might inadvertently preempt pre-existing, traditional state regulation. See Connecticut Light & Power Co. v. Federal

Power Comm'n, 324 U.S. 515, 532 (1944) quoting City of Yonkers v. United States, 320 U.S. 685, 692 (1944) ["'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone'."]. It, therefore, defeats the ability of federal agencies to jerrybuild new, preemptive power by tying technological changes to out-of-context statutory provisions and inferring either that Congress would have endorsed preemption of the traditional state regulation had it known of today's developments or that although Congress did not consider preemption, it inadvertently permitted preemption by assigning a federal agency a particular power, which -- when coupled with subsequent developments -- became preemptive. Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 422-423 [an assertion of "tremendous growth in size and efficiency of the modern thermal-electric power complex and the concomitant increase during the past half century in the quantity of water used by steam plants and change in the nature of that usage. . . . is properly addressed to Congress, not to the courts"]; Building and Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., 507 U.S. 218, 224 (1993) ["We are reluctant to infer preemption"]; Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 376 (1986) ["only Congress can rewrite this statute"]; see American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 513 (1981); Conroy v. Aniskoff, 507 U.S. 511, 515 (1993) [a statute is to be read as a whole, since the meaning of statutory language depends on context].

The standard of review requiring a showing of "clear and manifest" congressional purpose to endorse preemption applies to this case because in 1935, when the FPA was

enacted, the states were unquestionably regulating all aspects of retail service, including the delivery of even out-of-state electricity by utilities to retail customers (1935 Hearings on H.R. 5423 at 399; Senate Report No. 621 at p. 48). Rather than allege that the FPA evidences a "clear and manifest purpose of Congress" to endorse federal preemption of state regulation over retail transmissions, FERC has stated that Congress did not consider the question (J.A. 347, States App. D-42, FERC Order 888 at 31,780; J.A. 400-01, States App. D-100, FERC Order 888 at 31,971-72; J.A. 593-595, States App. E-40-41, FERC Order 888-A at 30,339-40).

The Court of Appeals nonetheless deferred to FERC's position that a provision of the FPA designed to limit federal regulation to matters "not subject to regulation by the states" (§ 201(a)) did not safeguard pre-existing state regulation of retail transmission and that although Congress did not contemplate unbundling (J.A. 594, States App. E-40, FERC Order 888-A at 30,340), FERC's authority under § 201(b) to set transmission rates became preemptive power in "[t]oday's unbundled world," id.; see also 225 F.3d at 694; States App. C-33-34. In affirming FERC, therefore, the Circuit Court disregarded Hillsborough by upholding federal agency preemption of pre-existing, traditional state regulation without evidence of supportive congressional intent. The Circuit Court also ignored the teaching of California v. Federal Energy Regulatory Comm'n, 495 U.S. 490 (1990), when it sanctioned FERC's termination of 80 years of state regulation over all aspects of retail deliveries in the face of Congress' directive that FERC not regulate matters "subject to regulation by the States" (§ 201(a)). See Solid Waste Agency v. Army Corps of Engineers, 531 U.S. 159, ___, 121 S. Ct. 675, 683 (2001) [rejecting deference where, inter alia, an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a

traditional state power"]. In deferring to FERC's reading of § 201(b) as preempting traditional state rate regulation and case law that FERC previously insisted was not relevant to state regulation (discussed below), the Circuit Court failed to follow Iowa Utilities Bd. v. Federal Communications Comm'n, 219 F.3d 744, 756 (8th Cir. 2000), wherein the court held that an agency is estopped from contradicting prior assurances made to the Court. Finally, the Circuit Court's deferral to FERC's reading of § 201(b), and the case law upon which FERC built its preemption theory, ignored the fact that FERC had taken a different position on the statute and these cases in testimony to Congress. See Food and Drug Administration v. Brown and Williamson Tobacco Co., 529 U.S. 120, ___, 120 S. Ct. 1291, 1312-1314 (2000) [a federal agency's prior assurances to Congress are relevant in subsequent jurisdictional disputes].

If the D.C. Circuit had subjected FERC's preemption of retail transmission to the correct standard of review, FERC's preemption would have been annulled.[8]

POINT II

RATHER THAN EVIDENCE A CLEAR AND MANIFEST CONGRESSIONAL INTENT TO AUTHORIZE FERC REGULATION OF AN ESSENTIAL ELEMENT OF RETAIL TRANSACTIONS, THE LEGISLATIVE HISTORY AND LANGUAGE OF THE FEDERAL POWER

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[8] As shown below, inasmuch as the bases for FERC's preemption theory are irrational, its decision does not pass muster even under the deferential standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

ACT SHOW THAT CONGRESS INTENDED TO SAFEGUARD PRE-EXISTING STATE REGULATION OF THE DELIVERY OF ELECTRICITY TO RETAIL CUSTOMERS

Inasmuch as the basis of each of FERC's three premises turns on the intention of the 1935 Congress, Section A below will examine relevant legislative history.[9] Section B below, subsections 1-3, will show that each premise is at odds with the language of the FPA.

A. The Legislative History And Historical Context Of The Federal Power Act Demonstrate Congress' Intention To Preserve The States' Jurisdiction Over All Aspects Of Retail Service

1. FERC Proposed Part II Of The FPA To Fill The "Attleboro gap"

Part II of the Federal Power Act was initially drafted by FERC's Solicitor, Dozier DeVane. Mr. DeVane testified to Congress that, with regard to electric rates and service, "[t]he bill simply fills this [Attleboro] gap and that is all"

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[9] In determining the will of Congress, the Court examines the language of the relevant statute and, when necessary, analyzes the statute's context and legislative history. Food and Drug Administration v. Brown and Williamson Tobacco Corp., 529 U.S. 120, ___, 120 S. Ct. 1291, 1300 (2000); Wisconsin Public Intervenor v. Mortier, 501 U.S. 601 (1991); Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986). See generally, Mikva and Lane, An Introduction to Statutory Interpretation and the Legislative Process, at 27-41 (1997).

(1935 Hearings on H.R. 5423 at 549; emphasis added).[10] See Testimony of Commissioner Seavey, 1935 Hearings on H.R. 5423 at 384. The states, for the most part, supported FERC's goal of filling the jurisdictional gap created by the Attleboro decision because the absence of regulation over wholesale rates affected retail rates. When a utility in one state sold power to another state utility, regulators in the purchasing utility's state were, due to Attleboro, unable to control the prices paid to the out-of-state company and had no access to the seller's records to determine whether a reasonable price had been charged. Moreover, even if the seller was shown to have charged an unreasonable price, retail rate disallowances of portions of the in-state utility's cost of purchasing the energy could jeopardize the financial health of the local utility. Thus, the states needed reasonable wholesale rates, which required that the jurisdictional gap be filled. See Comments of John E. Benton, Solicitor, National Association of Railroad and Utility Commissioners (NARUC), 1935

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[10] In Mr. DeVane's words:

> There has been considerable discussion here as to what is the purpose of this legislation and the effect it will have upon States and upon State regulation, and in that connection, I wish to say that in the instruction to its representatives that participated in the preparation of this legislation, the Federal Power Commission directed that what it desired to recommend to Congress was legislation that would complement and not supersede State regulation.
>
> Our specific instructions, from our Commission, was [sic] to preserve to the fullest extent State regulation and to draw a law that would complement that regulation as far as Congress could go. (p. 495)

Hearings on H.R. 5423 at 1654-1657; see also Comments of Rep. Monaghan, 1935 Hearings on H.R. 5423 at 761; 1935 Hearings on S. 1725 at 756-757; Comments of FERC Solicitor DeVane and Senator Hastings, 1935 Hearings on S. 1725 at 250-251. The "Attleboro gap," therefore, was constantly brought to the attention of Congress during its deliberations. See, e.g., H. Rep. No. 1318, 74th Cong., 1st Sess., at 17 (1935); 1935 Hearings on S. 1725 at 245-246.

2. The States Proposed Various Amendments To FERC's Proposal To Safeguard Pre-Existing State Regulation

While FERC had conferred with some state officials in developing its proposal, the states remained concerned that in filling the "Attleboro gap," Congress might inadvertently empower FERC to preempt pre-existing state regulation (1935 Hearings on H.R. 5423, Benton Testimony, at 1624; Baldridge, supra, at 256. The source of their misgivings was the Interstate Commerce Commission's preemption of specific intrastate railroad rates to avoid discrimination against interstate commerce. Shreveport Rate Cases, Houston, E&WTR Co. v. United States, 234 U.S. 342 (1914). NARUC Solicitor Benton, therefore, cautioned:

> State commissions do not wish to repeat that [Shreveport Rate Cases] experience in the utility field. Accordingly, they have sought in the amendments to Title II of this bill to separate the field within which the federal regulatory commission may exercise jurisdiction from that which is reserved to the states, and to make that separation so clear and explicit throughout the bill that there may be no opportunity for judicial construction to

> make the legislative purpose miscarry. 1935 Hearings on S. 1725 at 760-761, supra.

Just as the states had asked the 1934 Congress to safeguard state regulation from a reoccurrence of the Shreveport Rate Cases when enacting the 1934 Communications Act (see Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 371 (1986)), the states asked the 1935 Congress to amend FERC's proposal (1935 Hearings on H.R. 5423 at 1637). Specifically, Solicitor Benton asked Congress to declare in § 201(a) that FERC jurisdiction over wholesale matters would not extend to services "subject to regulation by the states" and to insert qualifying language in sections granting FERC jurisdiction over specific subjects, such as rate regulation of transmission (§ 205). See Benton, 1935 Hearings on S. 1725 at 767, 768; 1935 Hearings on H.R. 5423 at 1556.

3. FERC Supported The States' Goal

In response to the states' proposed amendments, FERC submitted a memorandum to the Senate, which stated, "the wholesale rates governed by [Attleboro] are the only rates which under this title are to be fixed by the federal commission." 1935 Hearings on S. 1725 at 800.[11] With regard to retail transmission, Solicitor DeVane emphasized that (1) the states were regulating retail transmission, the cost of which represented the major part of retail customers' monthly bills (1935 Hearings on H.R. 5423 at 553, 556); (2) they were doing a splendid job (id. at 498); and (3) the bill

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[11] See 1935 Hearings on H.R. 5423 at 2143, wherein FERC Solicitor DeVane stated that "the bill does not propose to confer any rate jurisdiction on the Federal Power Commission other than wholesale rates."

did not disturb this regulation (id. at 495, 502). See 1935 Hearings on H.R. 5423 at 548, wherein Solicitor DeVane stated that the bill gave the FPC no "jurisdiction whatever over facilities used in local distribution or the transmission facilities that are used in connection with such local distribution" (emphasis added).

FERC Commissioner Seavey, testifying in support of FERC's proposal, stressed that no pre-existing state regulation would be disturbed ["everything is left to the state commissions that they are performing now" (1935 Hearings on H.R. 5423, Testimony of Clyde Seavey at 402)]. Thus, there is no evidence (much less a "clear and manifest" showing) that Congress authorized FERC to preempt the states' pre-existing regulation of in-state retail transmission.

4. Congress Approved FERC's Proposal, With Amendments Proposed By The States To Preserve Pre-Existing State Regulation Over All Aspects Of Retail Service

a. Senate And House Committee Reports

After the public hearings, the Senate Committee discarded the original bill and submitted a new bill, S. 2796, which narrowed FERC jurisdiction. In recommending S. 2796, congressional staff noted that neither § 201(b), the FPA provision which FERC now cites for preemptive power, nor any other part of the 1935 amendments, took "authority from state commissions" (e.g., House of Rep. Committee on Interstate and Foreign Commerce, Rep. No. 1318, 74th Cong., 1st Sess. (H. Rep. No. 1318) at 8) and that the Act would not "impair or diminish the powers of any state commission." Senate Committee on Interstate and Foreign

Commerce, Rep. No. 62, 74th Cong., 1st Sess. (S. Rep. 621) at 48. The Senate Report also gave full recognition to Mr. Benton's objectives by noting that:

> The revision has . . . removed every encroachment upon the authority of the states . . . . The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of federal authority over state matters. S. Rep. No. 621 at 18.

The Reports repeatedly stated that the proposed legislation safeguarded all aspects of pre-existing state regulation. For example, Senate Report No. 621 notes at page 48:

> Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.
>
> ***
>
> Subsection (b) defines the scope of this part of the act and the jurisdiction of the Commission. Its provisions . . . do not apply to the retail sale of any energy in local distribution. This subsection leaves to the states the authority to fix local rates even where the energy moves in interstate commerce . . . the ratemaking powers of the Commission are confined to those wholesale

> transactions which the Supreme Court held in [Attleboro] to be beyond the reach of the States. Jurisdiction is asserted over all interstate transmission lines[12] . . . (id. at 48; emphasis added).

Similar assurances appear throughout the corresponding House Report. H. Rep. No. 1318, 74th Cong., 1st Sess. (1935).

Thus, § 201(a) was changed to limit FERC's regulation "to those matters which are not subject to regulation by the states." See H. Rep. No. 1318 at 8.

b. Congressional Floor Debates

In debating the revised bill, individual members of Congress emphasized that the bill would leave the responsibility of setting retail transmission rates to the states -- even when the transmission crossed state lines. For example, Congressman Lea stated, "[w]here a public utility generates its power in one state and transmits it to another state for its own distribution . . . the Federal Power Commission does not fix the rate of delivery but does give the state commission the information on which the state commission can fix its rates" (emphasis added). 79 Cong. Rec. 10378 (daily ed. June 28, 1935) (statement of Congressman Lea).

In explaining title II, Senator Wheeler stated Congress' intention that "nothing in this act shall in any wise interfere

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[12] As evidenced by § 206(b), later § 206(d), FERC's jurisdiction over interstate transmission facilities was to be contrasted with its lack of jurisdiction over the retail services carried by those facilities.

with State regulation. We preserved the State regulation completely in the bill, but in title II we made the positive statement that the policy should be not to interfere with State regulation, but to assist and help State regulation." 79 Cong. Rec. 8775 (daily ed. June 6, 1935) (statement of Senator Wheeler). As the House of Representatives concluded debates, Congressman Cole stressed that state jurisdiction would not be subjected to a reoccurrence of Shreveport:

> I doubt if any State commission or State officials familiar with the bill as it is now before you will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. In doing so we have tried--and I think successfully--to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit. 79 Cong. Rec. 10383 (daily ed. June 28, 1935) (statement of Congressman Cole).

c. FERC's View Of Its New Authority

Upon passage of the Federal Power Act, FERC stated that the FPA left all retail regulation -- including retail transmission -- to the states. In FERC's words:

> . . . The act does not give the Federal Commission any authority over local rates for electric service, this function being reserved exclusively to the States . . . . The act authorizes the Federal Power Commission, upon the request of any State commission to

> investigate the cost of production and transmission of electric energy by means of interstate facilities beyond the jurisdiction of the requesting State and to place such desired information at the disposal of the State commission . . . . Thus the State . . . may hereafter enter upon such local rate cases armed with the facts essential to local rate control (emphasis added).

Fifteenth Annual Report of the Federal Power Commission (1935) at 1-2; see D. DeVane Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 George Washington L. Rev. 31, 36-41 (1945-1946) [wherein Solicitor DeVane noted that all aspects of regulation of consumer rates had been left to the state].

Thus, the legislative history and context of the 1935 Act demonstrate that Congress filled the "Attleboro gap" while preserving state regulation of all elements of retail service.

B. The FPA Limits FERC's Jurisdiction To Wholesale Sales And Associated Transmissions, With Regulation Of All Retail Service Being Reserved To The States

As discussed above, FERC's preemption theory rests on three, interdependent premises. First, FERC concedes that Congress preserved state regulation of retail (or direct) sales of the commodity (electricity) and the part of the commodity's delivery that uses a utility's distribution system, but it claims the regulation of retail transmission was taken by Congress from the states and given to FERC. J.A. 349-50, States App. D-44, FERC Order 888 at 31,781; J.A. 392, States

App. D-92-93, FERC Order 888 at 31,968-69; J.A. 593-94, States App. E-39-40, FERC Order 888-A at 30, 339.

The second premise of FERC's preemption theory is that if the rate charged for the commodity appears separately on a retail customer's bill, the commodity's "transmission" becomes a separate retail service, subject to FERC jurisdiction under § 201(b) if it is in interstate commerce. Finally, FERC argues that Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61 (1943) and Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972), render all transmissions on the interconnected grid interstate. Each premise is addressed below.

1. FERC's Claim To Regulatory Authority Over A Part Of Retail Deliveries Is Not Supported By Any Provision Of The FPA

a. Section 201(a) Safeguards Pre-Existing State Regulation

Section 201(a) provides that FERC's jurisdiction shall "extend only to those matters which are not subject to regulation by the states" (§ 201(a)). In 1935, the states were regulating all aspects of retail deliveries (1935 Hearings on H.R. 5423, Solicitor DeVane at 556, supra). Indeed, inasmuch as the utilities' recovery of transmission and distribution costs represented most of the average retail customer's bill (id.), state regulation of retail deliveries was as important to local communities in 1935 as was state regulation of the commodity. See 79 Cong. Rec. 8773-8774 (daily ed. June 6, 1935) (statement of Senator Wheeler) ["The utility business . . . is essentially a local business and its rates ought to be subject to local regulation whenever and wherever it is possible for them to be so regulated."]; see also 1935

Hearings on H.R. 5423, Testimony of Commissioner Seavey at 393.

Section 201(a) is absolutely consistent with the testimony of FERC Commissioner Seavey to the 1935 Congress that "everything is left to the state commissions that they are performing now" (1935 Hearings on H.R. 5423, Testimony of Clyde Seavey at 402). As discussed below, the Court has held that § 201(a)'s general prohibition, while not nullifying FERC's authority to review utility accounting or financing, does apply to state rate regulation of "generation, transmission and sale" (emphasis added). Jersey Central Power & Light Co. v. Federal Power Comm'n, 319 U.S. 61, 74 (1943); Northwestern Elec. Co. v. Federal Power Comm'n, 321 U.S. 119 (1944). Section 201(a), therefore, discredits FERC's initial premise and its preemption theory. Because Congress safeguarded state regulation of retail[13] transmissions, FERC cannot preempt such regulation.

b. FERC's Preemption Theory Ignores The Retail/Wholesale "Bright Line" Established By The FPA

From 1935 until its issuance of the opinion under review, FERC did not attempt to regulate retail service. Its respect for state regulation of retail services was articulated in several agency decisions (e.g., Middle South Energy, Inc., 31 FERC ¶ 61,305 at p. 61,643 (1985)), which referenced the holding of this Court in Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205, 214 (1964)

[13] Again, in the words of FERC Solicitor DeVane, "the bill does not propose to confer any rate jurisdiction on the Federal Power Commission other than wholesale rates." 1935 Hearings on H.R. 5423 at 2143.

[Congress adopted a test "which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local rates to ultimate consumers'"].

In confirming the retail/wholesale bright line established by the 1935 Congress, the Court in Federal Power Comm'n v. Southern California Edison recounted two of its decisions interpreting the Natural Gas Act. Illinois Natural Gas Co. v. Central Illinois Public Serv. Co., 314 U.S. 498, 504-505 (1942) ["In applying [a] mechanical test for determining when interstate commerce ends and intrastate commerce begins, this Court has held that the interstate transportation and the sale of gas at wholesale to local distributing companies is not subject to state control of rates [citations omitted] . . . state regulation of local retail rates to ultimate consumers has been sustained where the gas so distributed was purchased wholesale from one who had piped the gas into the state . . . ."] and Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n, 332 U.S. 507, 517 (1947) ["The line of the statute was thus clear and complete. It cut sharply and clearly between sales for resale and direct sales for consumptive uses."].

When one considers: (a) FERC's insistence in proposing the 1935 amendments that it was not disturbing pre-existing state regulation; (b) FERC recognition after enactment of the FPA that all aspects of retail regulation were left to the states; (c) the absence of any assignment in the FPA of retail matters to FERC; (d) § 201(a)'s plain language and this Court's holding in Jersey Central that § 201(a) applies to transmission; and (e) case law recognizing a retail/wholesale bright line, it becomes clear that FERC's claim to jurisdiction of retail transmission service is baseless.

2. FERC's Claim That Unbundling And Section 201(b) Give It Jurisdiction Over Retail Transmission Service Is Not Supported By The FPA

While conceding that the FPA's legislative history contains no evidence of congressional intent to preempt the states' pre-existing regulation of utility rates charged retail electric customers (J.A. 347, States App. D-42, FERC Order 888 at 31,780), FERC's preemption theory assumes that if Congress had envisioned the unbundling of retail transmission, it would have authorized preemption when the commodity was unbundled from transmission (J.A. 349-50, States App. D-44, FERC Order 888 at 31, 781).

a. Section 201(b) Was Not Intended To Authorize FERC Regulation Of Retail Transmission

FERC's rate jurisdiction is set forth in §§ 205 and 206 of the FPA. As originally proposed, § 205 might have been read to empower FERC to set the rates public utilities charge for all transmissions of electric energy. At the request of NARUC Solicitor Benton, however, Congress inserted language limiting FERC's ratemaking jurisdiction over transmission to the specific transmissions "subject to the jurisdiction of the Commission." Thus, as FERC subsequently conceded, "[i]t is only in Section 201(b) that the [transmission] 'jurisdiction of the Commission' is defined and conferred" (September 1963 Federal Power Commission Brief to Supreme Court on Writ of Certiorari in Federal Power Comm'n v. Southern California Edison, pp. 29-30, n.16).

Section 201(b) was intended to assign FERC jurisdiction over interstate transmissions associated with

wholesale transactions. As FERC stated in a memorandum to the Senate, "the wholesale rates governed by [Attleboro] are the only rates which under this title are to be fixed by the federal commission." 1935 Hearings on S. 1725 at 800. See 1935 Hearings on H.R. 5423 at 2143, wherein FERC Solicitor DeVane stated that "the bill does not propose to confer any rate jurisdiction on the Federal Power Commission other than wholesale rates." Thus, inasmuch as Congress only authorized FERC to set transmission rates for wholesale transactions, § 201(b) cannot be read as authorizing FERC to preempt state regulation of retail deliveries.[14]

In addition to authorizing FERC to regulate interstate transmissions associated with wholesale service, § 201(b) denies FERC jurisdiction of "facilities used in local distribution." FERC takes the position that transmission lines used to deliver electricity from a supplier to an end-user are not "used in local distribution" and that this provision, therefore, does not safeguard the states' jurisdiction over transmissions to retail customers (J.A. 426-430, States App. D-123-125, FERC Order 888 at 31,980-81).

Section 201(b)'s denial of FERC jurisdiction over "facilities used in local distribution" should be read in context with § 206(d),[15] which provides:

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[14] Solicitor DeVane emphasized that (1) the states were regulating retail transmission, the cost of which represented the major part of retail customers' monthly bills (1935 Hearings on H.R. 5423 at 553, 556); (2) they were doing a splendid job (id. at 498); and (3) the bill did not disturb this regulation (emphasis added; id. at 495, 502).

[15] FPA § 206(b) was redesignated § 206(d) by Pub. L. 100-473, § 2, 102 Stat. 2299 (1988).

> The Commission upon its own motion, or upon the request of any State commission . . . may investigate and determine the cost of . . . transmission of electricity energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

In Connecticut Light & Power v. Federal Power Comm'n, 324 U.S. 515 (1945), FERC, relying on then § 206(b) for the proposition that it could assert jurisdiction over, but not regulate the rates of, companies selling out-of-state electricity to retail customers, conceded that the states regulated all aspects of retail transactions -- even when energy was in interstate commerce. December 1944 Brief for the Federal Power Commission, pp. 28-29. Whether a delivery line was designated transmission or distribution was significant for the purpose of determining if the owner of the facility was a "public utility" and, therefore, subject to FERC's general jurisdiction (e.g., accounting, financial review), but the designation of a line as transmission had no significance for determining whether FERC could regulate the rates that the line's owner could charge retail customers for the use of the line to deliver electricity. The transmission versus distribution distinction had no significance -- by FERC's admission -- because FERC had "no authority to establish a rate" for the utility's sale of energy, even "out-of-state energy" over the line if the sale was to "ultimate consumers." Id. at 28. If the 1935 Act denied FERC jurisdiction to set retail rates, even when transmissions were in interstate commerce, then FERC has no statutory basis from which to jerrybuild preemptive power due to unbundling. See Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 374 (1986) ["an

agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it"].

FERC's concession in Connecticut Light & Power was consistent with FERC Solicitor DeVane's testimony to Congress that although Congress was being asked to empower FERC to regulate wholesale sales and associated transmissions in interstate commerce "[t]his bill does not give the Commission any jurisdiction whatever over facilities used in local distribution or the transmission facilities that are used in connection with such local distribution" (1935 Hearings on H.R. 5423 at 548; emphasis added). Mr. DeVane's observation that the regulation of retail delivery services was off-limits to FERC was consistent with § 201(a)'s declaration that the FPA only empowered FERC to do what the states could not do (1935 Hearings on H.R. 5423 at 2156).

The flaws in FERC's second premise are further magnified by a review of recent congressional action. Congress in 1992, in order to facilitate FERC regulation of wholesale sales, empowered FERC to order electric utilities, on a case-by-case basis, to carry other suppliers' electricity. It did not, however, empower FERC to infringe on state jurisdiction over retail transmissions. Rather, it stated that "[n]othing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer" (§ 212(h)).

Thus, Congress in 1935 prohibited FERC from regulating matters, such as retail transmission, that were being regulated by the states in 1935 (§ 201(a)), and denied FERC jurisdiction over transmissions used to facilitate local service (§ 201(b); 1935 Hearings on H.R. 5423 at 501, 548, supra).

In 1992, it declared that FERC's authority to order a utility to open its transmission facilities for wholesale transactions could not impede state authority to regulate retail transmissions (§ 212(h)).

b. FERC's Preemption Theory Is Not Realistic

FERC's conjecture that Congress intended § 201(b) to empower it to set retail transmission rates is utterly unrealistic given that (1) the 1935 Congress was simply empowering FERC to do what the states could not do and (2) the Federal Power Commission -- with about 290 civilian employees in 1935 (Fifty-second Annual Report of the United States Civil Service Commission (1935) at 3)[16] and no ratemaking expertise (First Annual Report of the FPC (1921) at 51, 57; Fifteenth Annual Report of the FPC (1935) at 1) -- was in no position to regulate retail transmission rates across the nation.[17] Twelve years later, when asked whether the Federal Government was better equipped than the states to regulate retail rates and services, FERC's Assistant General Counsel stated, "I definitely say, no" (1947 Hearings on H.R. 2972 at 575).[18]

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[16] The New York Public Service Commission alone had 382 employees in 1935. Laws of New York, 158th Sess. Vol. 1-2 (1935) at 242.

[17] FERC had to draw on other agencies, including the Departments of War, Interior and Agriculture, for even routine licensing oversight (Fifteenth Annual Report of the Federal Power Commission (1935) at 9).

[18] See "Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938," 14 George Washington L. Rev. 31, 40 (1945-1946) [wherein Mr. DeVane acknowledged not only that FERC regulation under the FPA was limited to wholesale rates, but that regulation of wholesale electric

c. FERC's Preemption Theory Is Irrational

Unbundling, as indicated above, is an itemization of retail electric customers' bills to encourage competition for an "unbundled" service. By FERC's admission, the 1935 Congress did not contemplate "[t]oday's unbundled world" (J.A. 594, States App. E-40, FERC Order 888-A at 30,339-40). Yet, FERC insists that with unbundling, "the jurisdictional lines change" (J.A. 350, States App. D-44, FERC Order 888 at 31,781). The irrationality of FERC's thinking is underscored by how and when unbundling changes the federal/state scheme.

First, as to how, FERC reasons that unbundling of the commodity creates a separate transmission service. Separating the commodity, but leaving transmission with distribution, metering and billing admittedly reduces by one the number of elements being bundled, but it does not isolate transmission service.

Second, as to when, as indicated, FERC's preemption theory is grounded in an assumption that Congress safeguarded state regulation of the retail commodity and retail distribution, but not retail transmission (J.A. 349-350, States App. D-44, FERC Order 888 at 31,781; J.A. 391-92 States App. D-92-93, FERC Order 888 at 31,969; J.A. 593-94, States App. E-39-40, FERC Order 888-A at 30,339). Such an assumption (that FERC may regulate retail transmissions) brings into question why bundling the commodity with retail transmissions would prevent FERC from preempting transmission, but bundling retail distribution with transmission would not do the same. See Niagara Mohawk Power

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rates was expected to be a minor FERC undertaking].

Corporation, 81 FERC ¶ 61,180 at p. 61,776 (1997) [wherein FERC stated that a utility need not separately show distribution and transmission on the bill]; see also Portland General Electric Company, 78 FERC ¶ 61,219 at p. 61,950-51 & nn.2-3, n.6 (1997). Inasmuch as electricity is useless unless it is delivered, why is the commodity or distribution any more an essential ingredient of a retail sale than transmission? The point is that FERC's preemption theory is irrational and internally inconsistent.

FERC's second premise runs afoul of the FPA's legislative history, and the FPA's language, which (1) limits FERC's jurisdiction over transmission rates (§§ 205, 206(d) and 201(b)); (2) preserves pre-existing state regulation (§ 201(a)); and (3) safeguards state transmission programs (§ 212(h)). FERC's premise is also unrealistic and internally inconsistent.

3. The FPA's Plain Language Unequivocally Defeats FERC's Premise That Essentially All Retail Deliveries On The Interconnected Grid Are In Interstate Commerce

Because Congress safeguarded state regulation of retail transmissions "even where the energy moves in interstate commerce" (Senate Report 621 at 48), FERC's preemption of retail transmission service would be unlawful even if all transmissions were interstate. Further, because the FPA does not empower FERC to regulate retail transmissions, FERC would lack authority to preempt state regulation even if Congress had not safeguarded pre-existing state regulation of all aspects of retail transactions.

Finally, even if Congress had authorized FERC to regulate retail transmissions in interstate commerce, which it

has not done, FERC's preemption of all retail transmissions on the interconnected grid would still be unlawful because: (1) most retail electricity transactions involve generators and consumers that are not only in the same state, but in proximity (p. 45 n.28 infra); and (2) the FPA states that transmissions are not interstate if they are between buyers and sellers in the same state (§ 201(c)).

FERC's description of Florida Power & Light, 404 U.S. 453 (1972) and Jersey Central, 319 U.S. 61, 73 (1943), as holding that all interconnected retail transmissions are interstate is misplaced (States App. D-90-92). As discussed infra, neither case supports FERC's position.

a. Jersey Central's Holding That FERC May Regulate Stock Purchases By Public Utilities Does Not Support FERC's Position

In the late 1930's, Jersey Central Power & Light Company, without FERC's approval, sold securities to New Jersey Power. When the FERC directed both companies to show cause why FERC approval was not needed,[19] litigation followed and the Supreme Court eventually was asked to answer two questions: first, was Jersey Central a "public utility" under the FPA?; and second, was New Jersey Power's purchase subject to FERC's jurisdiction?[20]

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[19] Section 204(a) prohibits public utilities from issuing securities without FERC approval. Section 203 requires FERC approval of stock sales by public utilities.

[20] Although § 203 of the FPA empowered FERC to review purchases of stock by public utilities, and New Jersey Power (as opposed to Jersey Central) was admittedly a public utility, a question remained whether § 201(a)'s admonition that federal

Question one, whether Jersey Central was a "public utility," turned on whether Jersey Central owned or operated facilities subject to the jurisdiction of the Commission (§ 201(e)). Inasmuch as § 201(b), as discussed above, assigned the Commission jurisdiction "over all facilities for . . . [interstate] transmission . . .," FERC's claim to review Jersey Central's financings came down to whether any Jersey Central transmission line carried any electric energy in interstate commerce.

Although no Jersey Central transmission line straddled a state line, the record showed that some energy generated by Jersey Central ultimately arrived in New York through an intervening company's transmission lines (319 U.S. at 63-64). Because Jersey Central's transmission lines, therefore, carried energy that was "transmitted from a state and consumed at any point outside thereof" [§ 201(c)], the Court held that Jersey Central's facilities transmitted energy in interstate commerce and Jersey Central was a public utility. 319 U.S. at 71-73.

The second issue was whether FERC's authority to review security purchases by public utilities applied to New Jersey Power. Noting that "although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission . . ., (319 U.S. at 73)" the Court asked whether FERC's § 203 power was nullified by § 201(a)'s preservation of pre-existing state regulation. Reasoning that § 201(a)'s "limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities

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regulation "extend only to those matters which are not subject to regulation by the state" barred FERC from regulating New Jersey Power's purchases from Jersey Central.

engaged in such production and distribution" (319 U.S. at 74, 75; emphasis added), the Court upheld FERC jurisdiction "to regulate the present transaction" (financing) (319 U.S. at 78; emphasis added).

The Court's analysis is instructive in several respects. First, the Court made it clear that all services of a "public utility" under § 201(e) are not FERC jurisdictional. 319 U.S. at 73. Thus, as indicated above, a company with transmission facilities that carried electricity in interstate commerce as well as intrastate commerce (see § 201(c)) would be a public utility, but FERC would not be able to regulate its retail transmission service (see 319 U.S. 74, 75) [§ 201(a)'s "limitation is directed at generation, transmission and sale . . .(emphasis added)"].

Second, in concluding that § 201(a)'s preservation of pre-existing state regulation did not negate Congress' authorization that FERC regulate purchases of stock by utilities, the Court explained how specific grants of authority (e.g., § 203 [reviews of purchases] and § 204 [sales]) should be read in the face of general denials of authority (§ 201(a)). As the Court indicated, Congress would not have spelled out FERC's authority to review purchases in § 203 if it had intended its § 201(a) denial of authority to nullify FERC's jurisdiction. Thus, § 201(a) gave way to § 203. Section 204(f)'s specific denial of FERC authority to review stock sales by public utilities where states reviewed stock sales, however, overrode the more general grant of authority in § 204(a) for FERC to review stock sales by public utilities.[21]

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[21] Finally, the fact § 203 did not contain a limitation such as that found in § 204(f) demonstrated that Congress was willing to tolerate, not preemption, but dual regulation of stock purchases under which FERC controlled the purchase of the stock and the

The Court's analysis is applicable to this case because, like § 204(f)'s limitation of § 204(a)'s authorization regarding stock sales, § 201(c)'s definition of interstate transmissions limits § 201(b)'s authorization regarding transmissions. Reading from the general to the specific, § 205 assigns FERC rate jurisdiction over transmission service, but generally limits that jurisdiction to transmission "subject to the jurisdiction of the Commission." Section 201(b) specifically limits FERC's transmission jurisdiction to "transmission of electric energy in interstate commerce" and § 201(a) preserves state jurisdiction over retail transmissions.

Thus, while there was a tension to be resolved in Jersey Central (between § 203's specific grant of power and § 201(a)'s general denial of jurisdiction), there is harmony in this case between § 205's limitation of FERC's transmission jurisdiction, § 206(d)'s recognition that FERC's jurisdiction over transmission facilities is broader than its jurisdiction over transmission services, and § 201(a)'s denial of FERC authority to preempt pre-existing state regulation, which includes the transmission of electricity to end-users. Each provision rejects FERC's claim that it may regulate all transmissions.

Finally, Jersey Central reiterates that an analysis of whether a utility can be regulated -- which turns on whether it owns facilities that transmit any energy in interstate commerce -- differs dramatically from an analysis of whether FERC may regulate a specific utility service, such as retail transmission. In the case of determining the use of a utility's facilities, the question is whether some energy generated in one state is consumed in another. 319 U.S. at 68-73. In the case of determining whether a utility service can be regulated

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New Jersey Board of Public Utility Commissioners controlled the sale.

by FERC, the question is: does the FPA clearly assign the specific service to FERC's bailiwick (id. at 73-78)?[22]

When state commissions, after Jersey Central, requested an amendment to the Federal Power Act to resolve any conceivable doubt over state jurisdiction, the FPC testified that an amendment was unnecessary because ". . . regulation of retail rates and local services is left to the states by the present Act even where the energy moves in interstate commerce." Hearings Before the Committee on Interstate and Foreign Commerce, House of Rep., 84th Cong., 1st Sess., on H.R. 2972, Testimony of FERC Chairman Smith (1947 Hearings on H.R. 2972) at 336; States App. N-14.[23] FERC's reliance on Jersey Central is misplaced.

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[22] FERC's December 1942 Brief in Jersey Central implicitly acknowledged that utility lines are used for interstate and intrastate transmissions (pp. 22-23). This concession cuts directly against FERC's current claim that all retail transmission in interconnected lines is interstate (J.A. 349-50, States App. D-44, FERC Order 888 at 31,781; J.A. 391-92, States App. D-92, FERC Order 888 at 31,968-31,969; J.A. 593-95, States App. E-40-41, FERC Order 888-A at 30,339-40).

Further, while properly insisting that § 201(a)'s denial of FERC jurisdiction over matters regulated by the state had no relevance to whether FERC could assert jurisdiction over Jersey Central, FERC acknowledged that § 201(a) resolved ambiguities (p. 25) and "might be of moment when a particular regulation is questioned" (p. 28). As discussed above, § 201(a)'s denial of jurisdiction to FERC over matters regulated by the states is of significant moment in this case because FERC seeks to preempt the states' regulation of an essential element of retail service.

[23] To the extent it would have reversed the result of Jersey Central, the amendment could have denied FERC jurisdiction over most electric utilities.

b. Florida Power & Light's Holding That FERC Could Review Florida Power & Light's Books Does Not Support FERC's Position

In Florida Power & Light, the ninth largest utility in the country argued that it was not a "public utility" and, therefore, was not subject to FERC's regulation of its accounting practices.[24] In order to "require FP&L to follow the Commission's Uniform System of Accounts" (FERC Brief at 23; States App. O-9), FERC needed to show only that Florida Power & Light's transmission facilities carried one or more electrons that were generated in Florida and consumed in Georgia.[25] FERC assured the Court that it did not seek to regulate any Florida Power & Light service.[26] May 1971 Brief for the Federal Power Commission at 23, 24; States App. O-3-4.

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[24] FPA § 301, 16 U.S.C. § 823, authorized FERC to review the books of public utilities.

[25] FERC described the issue as "whether interstate energy is present in a system or a particular portion of [FP&L's] system" (id. at 30; States App. O-9). The Court described the issue as whether "any FP&L power has reached Georgia, or FP&L makes use of any Georgia power, no matter how small the quantity . . ." (404 U.S. at 461 n.10; emphasis added).

[26] FERC's brief to the Supreme Court also conceded that FERC's rate jurisdiction over interstate sales was limited by Congress to sales at wholesale (§ 201(b)) and that FERC had "no authority over retail sales" (May 1971 Brief for the Federal Power Commission, id. at 21; States App. O-2). FERC added that the Federal Power Act was enacted "to extend federal authority only to those matters which could not effectively be controlled by the states." Id. at 20.

FERC offered two, alternative arguments in support of its position that Florida Power & Light's transmission facilities carried one or more electrons that were generated and consumed in different states. First, it hypothesized that all of the elements of the interconnected, interstate network, of which Florida Power & Light was a member, were locked in electromagnetic unity, that the slightest use of electricity in Florida Power & Light's service territory affected other states and that "this cause and effect relationship constitutes interstate transmission of electric energy" (FPC Brief, p. 25; States App. O-5). The Court neither approved nor rejected this argument.

Second, FERC relied on its staff's "tracing studies," which showed that some electrons generated in Florida Power & Light's transmission system, after commingling with electricity in intermediate utilities' lines, eventually made their way into Georgia (May 1971 Brief for the Federal Power Commission, pp. 32-37). Thus, as in Jersey Central, FERC pointed to record evidence that one or more electrons in the company's transmission lines were consumed in another state.

The Court determined that the FERC staff's tracing studies represented substantial evidence in support of FERC's position (404 U.S. at 464-465, 469). It, therefore, concluded that Florida Power & Light was subject to FERC jurisdiction. 404 U.S. at 469.

FERC's reliance on Florida Power & Light for preemptive power over all retail transmissions on the interconnected grid is baseless for several reasons. First, FERC did not argue in Florida Power & Light, and the Court's decision did not even remotely suggest, that all electrons transmitted by Florida Power & Light (or any other utility) crossed state lines. FERC's inductive expansion of

Florida Power & Light equates to an argument that if one human being has one or more white blood cells, then all blood cells of all human beings are exclusively white. Just as the existence of white blood cells in human beings does not render red blood cells nonexistent, the fact that there was substantial evidence in Florida Power & Light that one or more electrons in Florida Power & Light's transmission facilities crossed state lines does not suggest all electrons in all interconnected utilities cross state lines and are consumed in states other than where they are generated.

Second, FERC's reliance on Florida Power & Light is inconsistent with its description to Congress of its own Florida Power & Light decision. When Congress called hearings in response to FERC's Florida Power & Light decision, FERC Chairman White testified that FERC's assertion of jurisdiction over Florida Power & Light had no relevance to the jurisdiction of states over retail services (1967 Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., Testimony of FERC Chairman Lee C. White, at 125; States App. H-15).

Third, FERC's use of Florida Power & Light as a preemption weapon is inconsistent with its implication to this Court that an affirmance of its order would not permit it to regulate retail matters. States App. O-2-4.

FERC was correct in its various decisions before Order 888, its sworn testimony to Congress in 1967 and its 1971 briefs to this Court in FP&L. Its reversal of position destroys any claim to deference that FERC could make for its reading of § 201(b) (see Point I). Food and Drug Administration v. Brown and Williamson Tobacco Company, 529 U.S. 120, ___, 120 S.Ct. 1291, 1313-15 (2000).

c. FERC's Reading Of Florida Power & Light And Jersey Central Renders Section 201(c) Nearly Nugatory

Section 201(c) provides that transmissions are in interstate commerce "if transmitted from a state and consumed at any point outside thereof." As indicated above, whether retail transmissions are in interstate commerce has significance only for the purpose of determining whether FERC has jurisdiction over the owner of the facilities used for the transmissions. Nonetheless, even if one assumes arguendo that states can only regulate intrastate retail transmissions, a premise defeated by Point B.1. supra, § 201(c)'s directive that transmissions from utilities to consumers in the same state are intrastate would still require an annulment of FERC's preemption order.

FERC's position, nonetheless, is that FP&L and Jersey Central render "interstate" all transmissions on lines connected to the national grid.[27] Thus, FERC implicitly claims the Court overrode § 201(c)'s unambiguous definition that transmissions are in interstate commerce only if the electrons they carry are consumed in a state other than that in which they are transmitted.[28] Florida Power & Light and

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[27] In order to reconcile its position with § 201(c)'s definition of interstate transmission, FERC would have to show that essentially every electron used by a retail customer in each state (other than Hawaii, Texas and Alaska) is generated in a different state. No such showing could be reasonably attempted.

[28] Further, even if Congress had not avoided potential debate by enacting a definition of interstate transmission, FERC's apparent assumption that all energy transmitted on an integrated grid is a commingled stream of random electrons is incorrect. Irrespective of the location of the buyer and seller, most energy passes from

Jersey Central offer no support for the suggestion that the Court intended to negate § 201(c).

POINT III

FERC PREEMPTION OF RETAIL TRANSMISSION WOULD IMPEDE SOUND ENERGY POLICY

A competitive electric marketplace is best served by adequate generation supply and ample avenues for delivery. State agencies are responsible for the siting of generation (e.g., New York State Public Service Law Art. 10) and transmission facilities (e.g., New York State Public Service Law Art. 7). By defeating the states' ability to allow for capital recovery of new transmission facilities, FERC's preemption decision could impede the siting of new transmission lines, and thereby impair the states' competitive policies, which FERC supports (J.A. 348, States App. D-42, FERC Order 888 at 31,780).

The manner in which transmission lines are maintained affects not only the reliability of retail service, but customers' bills. For example, if a utility takes a transmission line out of service for maintenance during the business week, it may avoid paying overtime, but create transmission, or distribution, constraints that dramatically increase prices.

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power plants to the retail customers who are first in line on transmission lines with suitable capacity. Corresponding energy movement in other parts of the grid has no significance. Nonetheless, even these indirect reactions do not occur in radial (direct line) delivery systems designed to serve retail load. See R. Sarikas, Introduction to Electrical Theory and Power Transmission, 70, 82 (1995); D. Fink & H. Beaty, Standard Handbook for Electrical Engineers, 2-4 (1987).

FERC is in no position to oversee the maintenance of transmission lines, yet by claiming power to preempt state regulation of the rates, terms and conditions of retail transmission service, it has potentially undermined the states' authority to do so.

Further, the reliability of the transmission system has been preserved for over six decades by federal/state cooperation. States with transmission systems that require local attention have acquired sufficient engineering resources to carry out this oversight. Regions with less complicated transmission paths, which lend themselves to one-size-fits-all modeling, have relied on industry self-regulation or FERC oversight. Order 888's preemption theory, again, undermines the authority of states to do what FERC cannot, and should not be asked to do, such as (a) supervising the coordination of the high voltage and low voltage arms of the delivery system; (b) requiring economically efficient system upgrades in response to local reliability requirements; (c) establishing and overseeing procedures for responding to transmission outages in a manner that assures safe and reliable service; and (d) seeking appropriate remedies when such procedures are not followed.

In preempting retail transmission rates, FERC has taken upon itself the responsibility for setting the depreciation charges that end-users will support through retail transmission rates. FERC is not in a position to assess the useful lives (and, therefore, the proper depreciation charges) for transmission lines throughout the nation. It is one thing for FERC to accept utilities' depreciation estimates for wholesale ratemaking purposes; it is another to impose such estimates on state regulators who have the resources to examine the utilities' estimates. See Louisiana Public Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355 (1986)

[annulling a Federal Communications Commission order preempting the regulation of depreciation charges].

Further, as the Court has often indicated (e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)), ratemaking entails a delicate balancing of ratepayer and shareholder interests, particularly with respect to retail rate regulation. This balancing affects millions of customers in various service classifications (residential, small business, industrial). One-size-fits-all ratemaking, by definition, omits such balancing.

Finally, FERC's preemption theory is self-defeating in that it discourages state regulatory agencies from unbundling[29] by diminishing the ratemaking jurisdiction of agencies that do so. It is irrational, contrary to sound energy policy and, as discussed in Points I and II, violative of the rule of law.

CONCLUSION

The 1935 Congress authorized FERC to regulate wholesale sales and interstate transmissions, but it denied FERC jurisdiction over matters subject to state regulation -- which included retail transmissions. While conceding that Congress did not envision unbundling (J.A. 594, States App. E-40; FERC Order 888-A at 30,339-40), FERC argues that "[t]oday's unbundled world" (id.) changes the retail/wholesale "jurisdictional lines" (J.A. 349-50, States App. D-44; FERC Order 888 at 31,781). If Congress did not envision unbundling, the sine qua non of FERC's preemption, then it could not have envisioned, much less intended, the preemption itself. Inasmuch as FERC is attempting to

[29] Cost of service studies needed for full unbundling can require significant resources.

preempt traditional, pre-existing state regulation without congressional authorization, its action should be annulled.

Respectfully submitted,

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